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IN THE

Supreme Court of the United States

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MICHAEL RODAK, JR., CLERK

October Term, 1971

No. 69-5030

On Writ of Certiorari to the Supreme Court of Georgia.

LUCIOUS JACKSON,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

No. 69-5003

On Writ of Certiorari to the Supreme Court of Georgia.

WILLIAM HENRY FURMAN,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

No. 68-5027

On Writ of Certiorari to the Supreme Court of California.

EARNEST JAMES AIKENS, JR.,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

No. 69-5031

On Writ of Certiorari to the Court of Criminal Appeals of Texas.

ELMER BRANCH,

Petitioner,

vs.

STATE OF TEXAS,

Respondent.

Motion for Leave to File Brief Amici Curiae on Behalf of James V. Bennett, Clinton T. Duffy, Robert G. Sarver, Harry C. Tinsley and Lawrence E. Wilson (No. 69-5030, 69-5003, 69-5031) and Brief Amici Curiae.

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James V. Bennett, Clinton T. Duffy, Robert G. Sarver, Harry C. Tinsley and Lawrence E. Wilson respectfully move for leave to file a brief *amici curiae* in these cases. The attorneys for each of the petitioners in these cases have consented to the filing of this brief. The Attorney General of the State of California has consented to the filing of this brief in *Aikens v. California,* No. 68-5027. The Assistant Attorney General of Texas has stated that it is not the policy of the Attorney

General's Office of Texas to consent to the filing of *amicus* briefs and has, consequently, failed to give the requested for consent in *Branch v. Texas*, No. 69-5031. The Assistant Attorney General of the State of Georgia, while stating that that office has no objection to our filing of an *amicus* brief, has not granted any express consent in the cases of *Jackson v. Georgia*, No. 69-5030, and *Furman v. Georgia*, No. 69-5003.

In view of the overwhelming importance of the question which this Court will be required to pass on, *amici curiae* believe that this Court should have before it the expression of their views since each has had intensive personal experience, in an official capacity, with respect to operation of our penal system and the infliction of the death penalty.

James V. Bennett is an attorney. He was formerly Director of the Federal Bureau of Prisons, and presently serves as a consultant to the Bureau. He is a past Chairman of the Criminal Law Section of the American Bar Association.

Clinton T. Duffy is a former Warden of San Quentin Prison, and also a former member of the California Adult Authority, and is a member of the Wardens Association of America.

Robert G. Sarver is an attorney. He has served as Commissioner of Corrections for the States of West Virginia and Arkansas.

Harry C. Tinsley served as Commissioner of Corrections for the State of Colorado until May, 1971. He is a former Warden of Colorado State Prison, and is a member of the Wardens Association of America and of the American Correctional Association. He has served as president of both organizations.

Lawrence E. Wilson is a former Warden of San Quentin Prison.

Amici have written numerous books and articles on criminal law and corrections, and on capital punishment in particular, have testified before legislative committees concerned with the death penalty, and have spoken extensively on the subject. *Amici* have witnessed hundreds of executions in the United States. Through years of first hand experience with the death penalty, its applications, its victims and its impact on the administration of justice and the correctional systems in our society, they have become confirmed opponents of capital punishment. (In this regard it should be noted that *amici* differ in the extent of their opposition to the death penalty in that Mr. Bennett might permit retention of capital punishment for the most heinous crimes, which he has suggested might include assassination of the President, treason and mass murder, such as by bombing an airplane.) *Amici* Duffy, Sarver, Tinsley and Wilson would abolish the death penalty entirely. *Amici* are nevertheless of one mind as to the abolition of the death penalty in almost all cases, including those now before the Court.

We believe that the proposed accompanying brief will be of assistance to the Court, and for the reasons stated above, we respectfully request leave to file the annexed brief *amici curiae*.

Respectfully submitted,

HILBERT P. ZARKY,
MARC I. HAYUTIN,
Attorneys for Movants.

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Opinions Below.

The opinion of the Supreme Court of Georgia (*Jackson v. Georgia,* No. 69-5030) holding that the imposition of the death penalty was not in violation of the Eighth and Fourteenth Amendments of the Constitu-

tion of the United States prohibiting cruel and unusual punishment is reported at 225 Ga. 790.

The opinion of the Supreme Court of Georgia (*Furman v. Georgia*, No. 69-5003) holding that the imposition of the death penalty was not in violation of the Eighth and Fourteenth Amendments of the Constitution of the United States prohibiting cruel and unusual punishment is reported at 225 Ga. 253.

The opinion of the Supreme Court of California (*Aikens v. California*, No. 68-5027) holding that the imposition of the death penalty was not in violation of the Eighth and Fourteenth Amendments of the Constitution of the United States prohibiting cruel and unusual punishment is reported at 70 Cal. 2d 369.

The opinion of the Court of Criminal Appeals of Texas (*Branch v. Texas*, No. 69-5031) holding that the imposition of the death penalty was not in violation of the Eighth and Fourteenth Amendments of the Constitution of the United States prohibiting cruel and unusual punishment is not yet officially reported. Its opinion is reported in 447 S.W.2d 932.

Jurisdiction.

Petitions for writs of certiorari in each of the cases were granted on June 28, 1971, limited in each case to the following question, "Does the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?" Jurisdiction of this Court in all cases is founded on 28 U.S.C. 1257(3).

Interest of Amici Curiae.

The interest of *amici curiae* has been set forth in the accompanying motion to file this brief and need not be reiterated here.

ARGUMENT.

The Infliction of the Death Penalty in Each of the Pending Cases Would Constitute Cruel and Unusual Punishment in Violation of the Eighth and Fourteenth Amendments.

From their personal experiences in the prison system, *amici* have concluded that the infliction of the death penalty does not serve any proven, legitimate purpose which society may have in imposing punishment for the commission of most capital offenses. While *amicus* James V. Bennett, as noted in the accompanying motion, believes that capital punishment may be appropriate in certain unusual situations, all *amici* are firmly convinced that in cases involving rape or murder, such as are involved here, the death penalty cannot be justified as legitimate punishment.

A. The Death Penalty Is Arbitrarily and Capriciously Imposed.

Amici have dealth with thousands of men and some women condemned to death and with thousands of other men and women convicted of similar crimes (in many instances convicted of more heinous crimes than those who have been condemned to die for their acts) but who have received jail sentences. Of course, the facts in each case are different. Nevertheless, any warden of a large prison, and certainly *amici* collectively, have vastly more experience with persons convicted of capital offenses than any jury, prosecutor or trial judge. *Amici* respectfully submit that they are therefore capable of generalizing about the crimes committed by these thousands of persons. What is it that distinguishes those who have been condemned to die from those who are permitted to live? What is it that distinguishes a man who, after having exhausted all ap-

peals must die at the hands of the State, from the man who is given a chance to demonstrate his rehabilitation after serving what is generally a 13 to 16 year term of imprisonment, and who may thereafter become a constructive member of society (though many lifers die in prison after serving 20, 30, or even 40 years)?

Bluntly, the distinguishing characteristics are poverty, ignorance, and out of all statistical proportion, race. This overwhelming fact is recognized not just by prison and probation officials and clerics who administer last rites to the condemned men, but by the prisoners themselves, whether condemned or not. Whatever may have gone into a judge's or jury's decision to visit death rather than life upon a convicted man, insofar as the prison community is concerned, the arbitrariness with which the death penalty is imposed makes a mockery of the supposedly rehabilitative system, and makes incalculably more difficult the arduous task of rehabilitating those who have by their crimes demonstrated a lack of understanding of our concepts of justice and law.

B. The Death Penalty Does Not Deter.

Amici, and Mr. Duffy in particular, have made extensive personal efforts during the tenures of their offices as wardens to determine what impact, if any, the death penalty has had on convicted criminals. Warden Duffy has interviewed hundreds of convicted men and women, both those who have been condemned to die and those who have been allowed to live. He has discussed the issue with prisoners who might have been condemned to death by the nature of their crimes, and prisoners whose crimes did not admit of the death penalty. As Warden Duffy testified in 1968 in an ap-

pearance before the sub-committee of the State Judiciary Committee, the invariable answer to his questions, given when the prisoner has already been convicted and need not curry favor with jailer or prosecutor, is that the existence of the death penalty had absolutely no impact on the perpetrators of the various crimes, whether the crime involved was burglary, robbery, rape, kidnapping or premeditated murder. Rather, invariably, the criminal has acted either out of passion or with the unalterable belief that he will not be caught.

Amici wish to go on record as emphatically disavowing any argument that the existence of the death penalty protects the administration of our prison system. In their opinion, any such argument is wholly fallacious, and the only impact of the death penalty in the prison community, except for those who are executed, is a terribly deleterious impact on prison morale—on both sides of the cell. On the contrary, *amici* are personally aware of instances of homicides within prison walls and even homicides by persons who have been involved in an official capacity with the administration of the death penalty, including in the case of Warden Duffy, a deputy sheriff who used to bring prisoners to San Quentin regularly and another man who helped install a lethal gas chamber at San Quentin and later killed three people. He was sentenced to death and died in San Quentin's gas chamber. Interviews with such persons again produced the invariable response that the death penalty was the farthest thing from their minds when they committed their crimes.

Amici think it ironic indeed that the only argument in favor of the death penalty which has some claim to legitimacy, that of deterrence, is mocked by the very method of death. If it be thought that the spectacle de-

scribed below would have a deterrent impact at least on those who must witness the awful sight, then why are executions conducted with only a very few witnesses present and the procedures kept as secret as possible? This is a far cry from public executions in 17th and 18th century England. The reasons for secrecy, *amici* submit, are clear. As is well known, homicides and other serious crimes increased after public executions in England, and *amici* believe that even secret executions in the United States promote more serious crimes in the community, rather than deter them. In addition, those who have imposed this secrecy have done so not out of regard for the man who must die, but in recognition that an execution is a demoralizing spectacle that degrades any person who participates in it. *Amici* believe that if executions were held in public in America today, the public would insist on abolition of the death penalty.

C. The Death Penalty Is a Tremendous Human Waste.

On the basis of their long years of professional experience, *amici* believe that most prisoners can be changed for the better, whatever the faults of our existing prison system. It is also statistically verifiable and comports with the personal experience of *amici* that persons convicted of capital offenses who are not executed, generally make very good prisoners. Not all of them are on parole. Warden Duffy alone saw 80 men die of natural death in prison, some of whom had served sentences of 30 to 40 years in the ten year period which he surveyed with complete statistics. However, those who are paroled are, in the opinion of almost all persons in any way involved in the administration of our parole system, by far the best parolees.

It is an extreme rarity that a man who has been convicted of a capital offense and paroled is ever convicted of another serious offense and returned to prison. To deny a chance at parole, especially in the arbitrary and capricious manner in which the denial is now made is to sacrifice society's legitimate interest in rehabilitation in favor of the base desires of some for retribution and vengeance.

D. The Imposition of the Death Penalty Admits of No Errors.

There have been errors. Whatever the procedural safeguards which may be imposed by this Court and by various legislatures, no system can be wholly free from error and an innocent person once put to death cannot be returned to life. More frequently there are the last minute commutation or pardons. *Amicus* Bennett has written graphically of his own experience involving emergency telephone calls that cannot be completed and break-neck automobile rides in an attempt to convey a message of presidential pardon before the executioner administered the final penalty.

E. The Death Penalty Hampers Effective Administration of Our Prison System.

Amici respectfully submit that the existence of capital punishment dehumanizes our system of prison administration to such a degree that it is increasingly difficult to obtain humane and enlightened administrators. *Amici* have personally known of numerous instances of persons who are unwilling to become involved in administering the death penalty who are very competent administrators and who are very concerned with the administration of our prison system. *Amici* have also known of instances of competent administrators resigning after the occurrence of a particularly grue-

some experience, and *amicus* Sarver stated publicly during his tenure in office that he would not permit an execution to take place so long as he was in charge of the correctional system.

F. The Death Penalty Is Barbaric.

Since very few persons have witnessed an execution, very few can realize the details, which we can only describe as barbaric, which are involved in the preparation for and the carrying out of the death penalty. A brief description of the methods of legalizing killing now employed by various jurisdictions in the United States seems appropriate.

The day before being executed, the prisoner condemned to death by hanging goes through the harrowing experience of being weighed and measured for neck size and length of drop, to assure that his neck will break when he is hanged. The hanging itself, whether the prisoner is dropped through a trap, after climbing the traditional 13 steps, or whether he is jerked from the floor after having been strapped, blackcapped and noosed, is a very gruesome spectacle. Generally, three men in a small enclosure on the gallows cut taut strings; one of these springs the trap, while the other two are attached to dummy ropes. This somewhat bizarre procedure is designed to give the three officers some feeling of non-responsibility for the death of their victim. The prison guard stands at the feet of the hanged person and holds his body steady, because during the first few minutes there is usually considerable struggling by the condemned man as he tries to breathe. Sometimes his neck does not break and he strangles to death. His eyes pop almost out of his head, his tongue swells and protrudes from his mouth, his neck

may be broken and the rope may rip large portions of his skin and flesh from the side of his face on which the noose is set. He urinates, he defecates, and his droppings fall to the floor while witnesses look on. In almost all executions at least one witness faints or has to be helped out of the witness room. The prisoner remains dangling from the end of the rope from 8 to 14 minutes before the attending doctor climbs up a small ladder and listens to his heartbeat with a stethoscope and pronounces him dead.

In States which practice electrocution, the body of the condemned man is prepared beforehand with a fastening, and one of his pants legs is split in order that an electric plate can be placed against his leg. When the executioner throws the switch that propels the electric current through the body of the prisoner, the victim cringes from torture, his flesh swells and his skin stretches to a point of breaking. He defecates, he urinates, his tongue swells and his eyes pop out. In some cases his eyeballs rest on his cheeks; his flesh is burned and smells of cooked meat; sometimes a spiral of smoke rises from his head.

When a firing squad is the method of death, several rifle shots are fired, all but one of which is effective. As in the case of hanging and electrocution, shooting disfigures the body of the prisoner.

In administering death by lethal gas, the State keeps the prisoner in a holding cell in a separate room for his last few days, usually not more than 20 feet from the lethal gas chamber. He is dressed in blue jeans and a white shirt as other garments might hold a pocket of gas. He is accompanied 10 or 12 steps to the gas chamber by two officers, quickly strapped in a metal

chair, a stethoscope applied and the door sealed. Out of sight of the witnesses the executioner, on a signal from the warden, presses the lever which allows the cyanide gas eggs to mix with the distilled water and sulphuric acid. At first there is extreme evidence of horror, pain and strangling. The prisoner's eyes pop, they turn purple, they drool. Soon the prisoner is unconscious. It is a horrible sight, at which witnesses frequently faint.

Whatever the means of death, the execution of a human being is a degrading spectacle which few can stomach. It is carried out in secret. The victim has paid his "debt to society" by suffering the ultimate punishment; but the State is not the richer.

Conclusion.

The death penalty itself is cruel and barbarous, imposed on the uneducated, the poor and the black and brown. Its existence distorts our whole system of criminal justice, brings distrust upon our courts, creates suspicion of the adversary system and makes the administration of our correctional system shunned by constructive and humane individuals who will not be involved in executing a death sentence. Almost all of western society save the United States has abolished the death penalty and the trend has become worldwide, except for such politically torn countries as Iraq and some of the African nations. *Amici* respectfully submit that the death penalty has no place in the administration of justice in the United States.

For each of the reasons discussed above, the death sentence imposed upon petitioners in the cases before the Court should be invalidated.

Respectfully submitted,

HILBERT P. ZARKY,
MARC I. HAYUTIN,
Attorneys for Amici Curiae.